

OFFICE OF THE CITY ATTORNEY  
OF THE CITY OF FRESNO, CALIFORNIA  
HILDA CANTÚ MONTOY  
City Attorney

OPINION  of  HILDA CANTÚ MONTOY City Attorney	No. FY 98-1  March 6, 1998
--	----------------------------------

TO: Honorable Mayor and Councilmembers

RE: Governance Under the Mayor-Council Form of Government

**QUESTION PRESENTED**

*Whether the Mayor has the authority under the Mayor-Council form of government to issue Executive Orders.*

**CONCLUSION**

Under the Charter, the Mayor is the Chief Executive Officer and is "responsible to the People of Fresno for the proper and efficient administration of all affairs of the City." Among the Mayor's specific duties set forth in the Charter is the duty "to execute and enforce all laws and ordinances and policies of the City." Based on these specific provisions and a reading of the Charter with its legislative history, the Mayor has authority to prescribe rules in the form of executive orders that execute broad legislative directives. To the extent a particular executive order implements, administers, and/or executes existing laws and ordinances, such executive order is lawful. To the extent a particular executive order does not conform with existing laws and ordinances or attempts to enact new laws and ordinances, the executive order is null and void.

///

## ANALYSIS

### A. Introduction.

On January 7, 1997, the City of Fresno commenced a new era by changing from the Council-Manager form of government to the Mayor-Council form of government. The change was created pursuant to Charter amendments approved by the voters on April 27, 1993. The Mayor-Council form of government is also referred to as the "strong mayor" form of government. However, "[t]he Mayor-Council form of government [adopted by the City of Fresno] is actually a 'modified' strong mayor form of government."<sup>1</sup> The modified Mayor-Council form of government does not have exact boundaries between executive and legislative powers and in its first year has proven to be a challenge.

The Charter operates as Fresno's "constitution." For this reason, this opinion endeavors to interpret the Charter in a manner which ensures that the intent expressed by the framers of the Charter is met.

This Office has found limited legal authority that expressly addresses the respective powers of the Mayor and Council under a charter such as the Charter of the City of Fresno. It has thus become necessary to utilize analogies and look at comparable forms of government. For example, the Opinion considers the separation of powers doctrine and the California Constitution's designation of the governor as the state's chief executive officer.

While the Charter is the determinative authority on powers under the new form of government, it contains gaps and inconsistencies.

We have, thus, analyzed particular text in context of the whole. In our analysis, we have followed opinions of the California Supreme Court in construing the constitution to construe the City of Fresno's constitution -- the Charter. In particular, we have adhered to the following enunciation by the California Supreme Court:

It is a cardinal rule of construction that words or phrases are not to be viewed in isolation; instead, each is to be read in the context of the other provisions of the constitution bearing on the same subject. [citation] The goal, of course, is to harmonize all related provisions if it is reasonably possible to do so without distorting their apparent meaning, and in doing so to give effect to the scheme as a whole." [citation]

---

<sup>1</sup> See City Attorney, "Mayor-Council form of government Summary and Transition Recommendations" June 7, 1996, pages 3 and 5 (emphasis in original).

Strained interpretation, or construction leading to unreasonable or impractical results, is to be avoided.  
[citation]<sup>2</sup>

## **B. Precepts Established By Mayor-Council Form of Government.**

Article II of the Charter is the foundation for the powers of the City. It lays the groundwork for interpreting Sections 400 and 500 which recite the respective powers of the Mayor and Council. The Charter must be read as a whole to ensure the orderly operation of the City's business, as contemplated by the voters. In other words, the Council and Mayor must work together. The Council cannot govern by itself and the Mayor cannot take action by himself. Neither can function in a vacuum, nor can either function so as to impair the other's exercise of powers granted by the Charter. Any examination of particular powers of the Mayor and Council must consider the full context of the powers and duties under the Charter.

### **1. Goals of Mayor-Council Form of Government.**

The legislative history of the Mayor-Council form of government shows that the goals of the Charter Review Committee which proposed the new form of government were: (a) to address problems associated with a dysfunctional Council by introducing a Mayor, whose primary function is to advance legislative proposals which are propelled by a vision for the future; (b) to retain the Council's role as governing body except insofar as it becomes more of a reactive body to the Mayor's proposals, and (c) to retain a semblance of the City Manager type of government, administered by a "professional manager," free of "political" interference.

### **2. Precepts Established By Charter.**

These goals were reviewed by the Council at the time and translated into a set of precepts which were incorporated into the amended Charter and submitted to the voters for approval. These precepts can be summarized as follows:

- a. The City Council is to function as the governing body largely as it did under the previous form of government, except insofar as it now must respond and react to Mayoral proposals and a Mayor-prepared budget. The Council serves as a "check" on Mayoral Power by declining to approve the

---

<sup>2</sup> *Fields v. Eu*, 18 Cal.3d 322, 328 (1976) [134 Cal.Rptr. 367]. See also, *Hanley v. Murphy*, 40 Cal.2d 572 (1953), *Salinas v. Pacific Tel. & Tel. Co.*, 72 Cal.App.2d 494 (1946) for the proposition that in arriving at the intention of the framers of the Charter the whole and every part of it must be taken and compared together.

Mayor's proposals and City budget. The Council has ultimate say in legislative matters with its ability to override vetoes of the Mayor.

b. The Mayor is the titular head of the City government and speaks for the City to the outside world. Notwithstanding the Charter's description of the Mayor as the Chief Executive Officer, his role is also legislative in nature. The Mayor formulates a vision for the City; develops legislative proposals and an annual budget consistent with that vision, and forwards legislative proposals and the budget to the Council for action. In addition, the Mayor vetoes legislation which is inconsistent with the vision. The veto is the Mayor's "check" on the power of the Council.

c. Though hired by the Mayor, the professional City Manager works for both the Council and the Mayor and must serve both. Neither can direct the City Manager in ways that frustrate the authority or mission of the other. Neither can dictate how the City Manager administers his staff.

d. The above checks and balances serve to create a dynamic that requires compromise and respect for boundaries of authority to achieve effective governance.

### **C. Powers of the Council.**

The City, as a "home rule" charter city, has the right to legislate and to exercise all rights, powers, and privileges granted by Charter, state law, or other applicable law.<sup>3</sup>

Charter Section 500 vests the exercise of all such powers in the Council as the "governing body," except as expressly provided in the Charter. These powers include all powers of legislation in municipal affairs adequate to a complete system of local government including the following powers:

- ! Exercise all powers of a municipal corporation (Charter Section 200).
- ! Adopt rules and procedures for the conduct of its proceedings and preserve order at its meetings (Charter Section 504).
- ! Appoint the City Clerk and City Attorney, approve the appointment of the Controller (Charter Sections 800 and 804).<sup>4</sup>
- ! Acquire property by purchase, lease, gift, bequest, eminent domain or otherwise (Charter Section 200 and 1303).
- ! To dispose of property. (*Id.*)
- ! Enter into contracts (Charter Section 200 and 202).

---

<sup>3</sup> Article II of Charter.

<sup>4</sup> Each Councilmember may also appoint a Council Assistant.

- ! Provide for the organization and conduct and operation of the several offices established by the Charter, create and re-organize departments, divisions, offices and agencies, assign functions and duties to offices, departments or agencies consistent and additional to those specified by Charter, and provide for the number, titles, qualifications, powers, and duties and compensation of all appointive officers and employees (Charter Section 801).
- ! Make and enforce all laws and regulations in respect to municipal affairs (Charter Section 200).
- ! Exercise all rights, powers and privileges authorized by state and federal law or regulation (Charter Section 200).
- ! Contract with any other city or county in the state, or a state department, or with any public or private agency to perform any administrative function of the City (Charter Section 202).
- ! Have control of all legal business and proceedings and employ other attorneys to take charge of any litigation or matter or to assist the City Attorney in any litigation or matter (Charter Section 804(g)).
- ! Approve the appointment to all City boards and commissions (Charter Section 902) and the budget of each such board and commission (Charter Section 901).
- ! Adopt the City's budget (Charter Section 1205).
- ! To acquire property (by purchase, lease, eminent domain or otherwise) and take other action for the purpose of establishing off-street vehicular parking, airport facilities, and other revenue-producing utilities (Charter Sections 1219, 1220, and 1221).
- ! To issue bonds, including revenue bonds (Charter Sections 1222 and 1223).
- ! To grant franchises (Charter Section 1302).

The Council possesses powers to operate "a complete system of local government." This includes acts administrative in nature. Like corporate boards, the Council acts at meetings where its actions are recorded by formal or minute resolutions. The Council appoints the City Attorney and City Clerk and approves the City Manager's appointment of the Controller. The Council also gives direction to the City Manager, gives direction to the City Attorney, adopts rules and procedures for the conduct of its meetings, contracts with public or private agencies for the performance of any city administrative function, contracts with private counsel to assist the City Attorney, writes-off claims owing to the City, and collects taxes, licenses, fines, rents, forfeitures, and other sums owing to the City. Council's authority to control litigation permits it to defend and compromise suits, to initiate litigation, to deny claims for damages, and to compromise claims.

Clearly, the Council has duties other than a traditional legislative branch. Moreover, by expressly excluding administrative and quasi-judicial acts from the Mayoral veto, the Charter expressly recognizes Council's right to exercise these powers. (Charter Section 605a)

**D. Powers of the Mayor.**

As set forth in Charter Section 400, the Mayor is the Chief Executive Officer with the power and responsibility to provide for the proper and efficient administration of all affairs of the City. Additionally, the Mayor is to provide leadership in taking issues to the people and marshaling public interest for municipal activity. Section 400 also lays out additional Mayoral duties and powers including:

- ! Execute and enforce all laws and policies.
- ! Appoint, control and remove the City Manager.
- ! Prepare the annual City budget for Council deliberation and approval.
- ! Veto legislative actions as described in Charter Section 605.<sup>5</sup>
- ! Serve as liaison between the Administrative Service and the Council under Charter Sections 400(g) and 706.<sup>6</sup>
- ! Foster a sense of cohesion among Council and educate the public about the needs and prospects of the City.
- ! Promote economic development.
- ! Recommend legislation and policy.
- ! Investigate the affairs of the City under the Mayor's supervision.

The Charter grants the Mayor authority to recommend legislation and policy, prepare the budget, and veto certain Council actions. Legislation recommended by the Mayor must still proceed through the Council for adoption.<sup>7</sup> And the Council has ultimate authority over legislative actions and budget matters through its power to override vetoes.<sup>8</sup>

Charter Section 400 vests the Mayor with executive power and names the Mayor the City's Chief Executive Officer. With executive power, the Mayor may act as necessary to ensure the proper and efficient administration of all City affairs. The Mayor may also issue policy directives to the City Manager who, in turn, may carry out the directives through administrative instructions to staff.

---

<sup>5</sup> The Mayoral veto does not extend to all actions taken by Council.

<sup>6</sup> The Mayor is prohibited from directly or indirectly giving orders to any subordinates of the City Manager; but see Charter Section 1202 for duty of Mayor to hold conferences with City Manager and with Department Directors in preparing the annual budget.

<sup>7</sup> See Charter § 500.

<sup>8</sup> Charter § 609.

Policy directives to the City Manager may be Executive Orders to set in motion administrative instructions that, among other things, may do the following:

- ! Govern budget preparation and administration.
- ! Execute the purchasing function.
- ! Develop procedures to administer economic development projects.

The Mayor has authority on a particular matter only when it is expressly or impliedly conferred upon him by charter or other applicable law.<sup>9</sup> Where applicable law permits or necessitates administrative interpretation, executive policy directives are appropriate. For example, in purchasing, the Mayor may use Executive Orders to streamline the purchasing process. The Executive Orders must be consistent with applicable state and local laws on competitive bidding and RFP processes.

#### **E. Limitations of Mayor and Council Under Section 706 of Charter.**

The Mayor has a specific duty to be the liaison between the staff and the Council.<sup>10</sup> In this role, the Mayor works with the City Manager in responding to and cooperating with Council requests or general staff direction. Individual Councilmembers are restricted from giving specific direction to staff, such as to place a stop sign on a certain street. But the Council may ask the City Manager for a report on the placement of stop signs city-wide. Or it may legislatively adopt a policy to direct the placement of stop signs on certain streets.<sup>11</sup> Such direction is consistent with the Council's power to legislate.<sup>12</sup>

Other than by official action on policy matters or by inquiries, the general Charter rule is that the Council and its individual members must deal with the staff through the City Manager.<sup>13</sup> While the same is true for the Mayor,<sup>14</sup> the Mayor exercises direct

---

<sup>9</sup> McQuillin, Mun. Corp., § 12.43.

<sup>10</sup> Charter § 400(h).

<sup>11</sup> See Separation of Legislative and Executive Powers of City Government discussion of Council and staff direction, infra.

<sup>12</sup> Charter § 500.

<sup>13</sup> Charter § 706.

<sup>14</sup> The Charter expressly provides limited exceptions to the elected official prohibition on interfering with the City Manager's performance or dealing directly with staff. For example, Section 400(d) allows the Mayor to prepare the budget and Section 1202 requires the Mayor to hold conferences with the City Manager and Department Directors in preparing the budget. These exceptions must be narrowly construed in light of Sections 706 and 400(g) and would not allow direct orders to staff except through the Manager.

authority over the City Manager and may give policy directives to the City Manager that the City Manager will carry out.

Whether a given Council or Mayoral official action rises to the level of an interference with the administrative branch must be viewed on a case-by-case basis.

The Mayor or an individual councilmember may also inquire about the status of a project or gather general information from staff. This subject is not new or unique to the new form of government. In fact, it has been previously raised and addressed in an October 6, 1964 City Attorney Opinion.<sup>15</sup>

Although our office issued the 1964 opinion during the Council-Manager form of government, it is still relevant. It analyzes Charter Section 706, which did not change in the Charter amendments to permit the Mayor-Council form of government. It prohibits the Mayor or Council from interfering with administrative service or from giving orders to staff but it excepts inquiries. That early opinion concludes that the Mayor and Councilmembers may request information directly from staff. Yet, it cautions that the requests may not include orders, or be so frequent as to interfere with the normal department or City Manager functions. Ultimately, the opinion finds that the City Manager may establish rules under which the departments may give out information.

We concur with the previous opinion and would add that the Mayor's and Council's rights to inquire and gather information regarding City business is fundamental to their exercise of powers. In sum, when the Council as a body takes official action on a policy matter and when the Mayor takes official action in the form of an Executive Order, the actions do not *per se* violate Charter Section 706. The text in Section 706 must be read in the context of the entire Charter. Similarly, we must review the substance of a particular policy matter adopted by the Council (in the form of ordinances and resolutions) or Mayor (in the form of Executive Orders).

**F. General Distinctions Between Legislative, Administrative and Executive Action: Creation vs. Implementation of Laws and Policies.**

Fresno, as a home rule charter city, has the power to make and enforce all laws and regulations respecting municipal affairs, subject only to charter and constitutional

---

<sup>15</sup>

See attached opinion.



limitations. (Cal. Const., art. 11, §§ 5 and 7; Charter § 200.) Typically, these powers involve legislative and executive powers (2A McQuillin, *Mun. Corp.* § 10.06 (3d. Ed.)).

Legislative power is the authority to make laws while executive power enforces the already existing law. Although at times the executive function by virtue of adopting rules and regulations to enforce the law, may become a secondary law source, such rules and regulations are limited by the principle that primary legislation remains within the jurisdiction of the legislative body.<sup>16</sup>

Legislative actions typically include the exercise of police powers or the adoption of general rules of conduct for future governance.<sup>17</sup> Another example of legislative action includes Council action involving an ordinance authorizing the construction of an access road.<sup>18</sup> Legislative acts have also been described as "[a]cts constituting a declaration of public purpose, and making provision for ways and means of accomplishment . . . ."<sup>19</sup>

Instances will invariably arise where an action has legislative and administrative elements. For example, a Council resolution acquiring property for a park, street or other public purpose is generally legislative,<sup>20</sup> but where previous legislative action to establish a testamentary trust fund to purchase a park site has been taken, the resolution directing the actual purchase is administrative.<sup>21</sup>

The key distinction between whether an act is legislative or administrative act is whether the Council action sets new policy or plans or merely pursues existing policy. If the former, it is legislative and subject to veto under Section 605; if the latter, then the act is administrative.

For these reasons, actions having dual legislative and administrative elements must be evaluated on a case by case basis, reviewing whether the proposed action is tailored to establish a legislative objective or to effectuate an objective which is already legislated.

---

<sup>16</sup> See 2A McQuillin, *Mun. Corp.* §10.06 (3d Ed.).

<sup>17</sup> E.g., adoption of general and specific plans, budgets and levy of taxes, *Strumsky v. San Diego County Employees Retirement Assn.*, 11 Cal. 3d 28 (1974).

<sup>18</sup> *Wheelright v. County of Marin*, 2 Cal. 3d 448 (1970).

<sup>19</sup> *McKevitt v. City of Sacramento*, 55 Cal. App. 117, 124 (1921).

<sup>20</sup> See *Reagan v. Sausalito*, 210 Cal. App. 2d 618 (1962).

<sup>21</sup> *McKevitt v. Sacramento*, 55 Cal. App. 117 (1921).

## **G. Separation of Powers of City Government.**

General limitations are inherent in the exercise of legislative and executive functions. For example, the Council cannot exercise legislative power in an arbitrary and capricious or unreasonable manner,<sup>22</sup> in a manner inconsistent with the Charter limitations, in a manner which directly interferes with the Administrative Service<sup>23</sup> or in a manner that impairs the executive functions of the Mayor.<sup>24</sup>

The Mayor is also limited in exercising executive powers. The Mayor must not exercise the executive powers arbitrarily or unreasonably.<sup>25</sup> Nor can the Mayor exercise the executive powers beyond the express delegation of the Charter or other source authority.<sup>26</sup> Finally, the Mayor cannot impair the legislative functions of the Council.<sup>27</sup>

While a line of authority has held that a strict application of the separation of powers doctrine to local governments is not required,<sup>28</sup> the legislative history leading to the adoption of the Charter provisions establishing the Mayor-Council form of government recognizes the need to maintain a balance of legislative and executive powers.

In fact, the November 3, 1992, Charter Review Committee report, which laid the groundwork for the Mayor-Council form of government, recommended the new government with "specific checks and balances." The report stated ". . . the Strong Mayor form we recommend allows the Mayor to articulate a vision, to have a professional manager to help implement the vision, and a City Council vested with certain powers to hold the Mayor's increased powers in check."<sup>29</sup>

---

<sup>22</sup> 2A McQuillin Mun. Corp. § 10.27 (3d Ed.).

<sup>23</sup> Charter § 706.

<sup>24</sup> See *Joyce Harbor et al. v. George Deukmejian*, 43 Cal. 3d 1078 (1987).

<sup>25</sup> 2A McQuillin, Mun.Corp. § 10.27 (3d Ed.).

<sup>26</sup> *Lukens v. Nye*, 156 Cal. 498 (1909).

<sup>27</sup> See generally, *Joyce Harbor et al. v. George Deukmejian*, 43 Cal. 3d 1078 (1987).

<sup>28</sup> *Strumsky v. San Diego County Employees Retirement Assn.*, 11 Cal. 3d 28, 48-49 (1974); *People v. Provines*, 34 Cal. 520, 534 (1868); 20 Ops. Cal. Atty. Gen. 69, 70 (1952).

<sup>29</sup> November 3, 1992, Charter Review Committee Report, p.2.

The concept of a government with separate legislative and executive functions is well-established at the federal and state levels of government. Article III, § 3 of the California Constitution specifies the separation of powers doctrine for the State of California. It reads as follows:

The powers of state government are legislative, executive and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.

While the Charter Review Committee spoke of "checks and balances" and while there is a separation of powers between the Mayor and Council under the Charter, there is no Charter language similar to the foregoing in the State Constitution.

One of the key purposes behind the doctrine is to avoid the accumulation of all the basic or fundamental powers of the government in one person or group.<sup>30</sup> The system of checks and balances protects against overreaching by any one branch of government.

In *Superior Court v. County of Mendocino*,<sup>31</sup> the Supreme Court considered a superior court challenge to a legislative act declaring the courts to "not be in session" on "unpaid furlough days." The court held that the statute did not violate the separation of powers doctrine because the legislature is free to place reasonable restrictions on the courts that do not materially impair the exercise of the judicial function.

The court also recognized that the respective governmental branches are mutually dependent, and are limiting in exercising their respective powers.<sup>32</sup>

At the state level, the chief executive officer is the governor.<sup>33</sup> We can compare the governor's functions with the executive and legislative functions of the Mayor. Both the governor and the Mayor are responsible to execute applicable state or local laws;<sup>34</sup>

---

<sup>30</sup> 13 Cal. Jur. 3d, Constitutional Law § 100.

<sup>31</sup> 13 Cal. 4th 45 (1986).

<sup>32</sup> See *Superior Court v. County of Mendocino*, 13 Cal. 4th 45, 52-53 (1996).

<sup>33</sup> Cal. Const., art. V, § I.

<sup>34</sup> Cal. Const., art. V, § 1 and Charter § 400(a).

both are granted authority to make legislative recommendations,<sup>35</sup> and both exercise veto powers over legislation.<sup>36</sup>

Under the separation of powers doctrine, the governor has limited legislative power and is forbidden from exercising any legislative power except as permitted by the Constitution. Thus, the governor like the Mayor must have an express grant of legislative authority. Otherwise, the executive branch must yield to the creative power of the legislature.<sup>37</sup>

Any attempt by the executive to exercise legislative powers or functions not expressly granted or to exercise them in a manner inconsistent with or beyond the underlying authority renders the act void.<sup>38</sup>

In the *Lukens* case, the Supreme Court considered an action to compel the state controller to issue a check settling a claim. The legislature had already appropriated the money -- a legislative act. Following legislative adoption of the appropriation and prior to his approval, the governor advised *Lukens* that the settlement amount was excessive and entered into a written agreement with *Lukens* to resolve the claim for \$25,000 rather than the \$45,616.30 which the legislature had approved. The governor then signed the bill into law appropriating the full \$45,616.30 to settle the claim.

*Lukens* subsequently sought to compel the controller to pay the full \$45,616.30 settlement in spite of his agreement with the governor. The state argued that the agreement was valid and *Lukens* was bound to accept the lower settlement. The California Supreme Court held that the agreement was invalid as the governor had no authority to enter into the agreement in the first instance. His only options were to approve, not to sign, or to veto the legislative bill.<sup>39</sup>

Under *Lukens*, attempts to exercise executive powers in a manner beyond the scope of authority are ineffectual and void. Similar constraints exist for the exercise of legislative powers.<sup>40</sup>

---

<sup>35</sup> Cal. Const., art. V, § 3; Charter § 400(j).

<sup>36</sup> Cal. Const., art. IV, § 10; Charter § 400(e) and (f).

<sup>37</sup> See *Superior Court v. County of Mendocino*, 13 Cal.4th 45, 54 (1996); *Brydonjack v. State Bar of California*, 208 Cal.439 (1929).

<sup>38</sup> *Lukens v. Nye*, 156 Cal. 498 (1909); see also 13 Cal. Jur. 3d Constitutional Law § 104.

<sup>39</sup> *Lukens v. Nye*, 156 Cal 498, 501-502 (1909).

<sup>40</sup> See *Harbor* case and discussion, infra.

Economic development projects are good examples of the executive-legislative interplay. The Mayor could certainly commit to lend support to a project and take steps to further his support. Such actions could include publicizing his support, recommending proposals to Council and providing staff assistance. However, the Mayor could not, absent Council approval, bind the City to a specific agreement for an economic development project.

Another instance of executive-legislative interplay involves labor relations. The Meyers-Milias Brown Act<sup>41</sup> specifies that a memorandum of agreement between the city and a labor organization must be presented to and approved by the governing body to be final.<sup>42</sup> The Council has designated the City Manager as its bargaining representative.<sup>43</sup> The City Manager may negotiate within the policy directions provided by the Council in closed session. Nonetheless, the final agreement is subject to Council approval.<sup>44</sup>

In *Long Beach City Employee's Association v. City of Long Beach*,<sup>45</sup> the court held that it was not bad faith for the city council to reject an agreement which had already been executed by the acting city manager because the agreement was not binding under state law until the council acted on it.

The separation of powers doctrine also protects the executive function from undue interference by the legislative body. In *Joyce Harbor et al. v. George Deukmejian*,<sup>46</sup> the court considered an attempt by the legislature to impair the Governor's ability to veto controversial items within proposed welfare legislation. The legislature unlawfully included the objectionable provisions within a multi-subject bill. The Governor attempted to partially veto only the objectionable portions of the bill. Welfare rights groups sought a writ of mandate challenging the partial veto and compelling the Governor to adopt the appropriation portions. The Supreme Court said the legislature had acted illegally by violating the single subject rule, and that had led to the Governor illegally exercising a partial veto. In striking a balance between the governor and the legislature, the court invalidated the objectionable portion of the law as

---

<sup>41</sup> Government Codes §§ 3500 et seq.

<sup>42</sup> Government Code § 3505.1.

<sup>43</sup> FMC § 2-1914; Government Code § 3505.

<sup>44</sup> Government Code § 3505.1.

<sup>45</sup> 73 Cal. App. 3d 273 (1977).

<sup>46</sup> 43 Cal. 3d 1078 (1987).

that would have been within the veto authority of the Governor had the legislature acted properly. (*Harbor v. Deukmejian*, 43 Cal. 3d 1078, 1102 (1987).)

The Council may also settle litigation (Charter § 803(g)), and the settlement would not automatically involve a veto, unless the matter involved a budget amendment or other legislative act otherwise subject to veto under the Charter.

## **H. Delegation of Powers.**

A corollary to the separation of powers doctrine is that legislative bodies cannot delegate legislative powers to an administrative body or an executive official. In *Kugler v. Yocum*, 69 Cal. 2d 371 (1968), the Supreme Court upheld an ordinance involving a salary setting formula based on an average set in an adjoining city. The challenge was for unlawful delegation of legislative authority. The court recited the well-established doctrine against unlawful delegation of legislative authority as "The power . . . to change a law of the state is necessarily legislative in character, and is vested exclusively in the legislature and cannot be delegated by it . . . ." <sup>47</sup>

Thus, any delegation by the Council to the Mayor cannot include legislative authority. The crux of legislative authority is the ability to create law. Actions deemed delegable include enforcement-related details. As noted by the *Kugler* court, "[t]he legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the power to fill up the details by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect . . . ." <sup>48</sup> Executive or administrative interpretation of a given law to 'fill up the details' would be consistent with the *Kugler* opinion, of the interpretation did not exceed the source authority, or prevent execution and enforcement as contemplated by the legislative body.

///

///

///

---

<sup>47</sup> *Dougherty v. Austin*, 94 Cal. 601, 606-607 (1892); see also *People v. Johnson*, 95 Cal. 471, 475 (1892); *People v. Wheeler*, 136 Cal. 652, 655 (1902); *Coulter v. Pool*, 187 Cal. 181, 190 (1921); *Duskin v. State Board of Dry Cleaners*, 58 Cal. 2d 155, 161-162 (1962); (*Kugler v. Yocum*, 69 Cal. 2d 371, 375 (1968).) The court also recognized the applicability of the doctrine to cities (*Id.* at 375).

<sup>48</sup> *Kugler v. Yocum*, 69 Cal. 2d 371, 376..

**I. SUMMARY**

Based on the foregoing analysis, the Mayor has the authority to issue Executive Orders. However, specific executive orders must be rooted in an express Charter, code or other lawful source of authority. In addition, the orders may not exceed the source authority. At the same time, the Council may not work to interfere with the legitimate exercise of the executive function by the Mayor as granted by the Charter.

Respectfully submitted,

/s/

Hilda Cantú Montoy  
City Attorney

Attachments

c: Jeffrey M. Reid, City Manager  
Rebecca E. Klisch, City Clerk

October 6, 1964

To: Honorable Mayor and Council

Subject: Interpretation of Charter Section 706

QUESTION: Councilman James F. Mandella, by letter of September 28, 1964, has requested the City Attorney and the City Manager to review the provisions of Charter Section 706 and to "give the Council their interpretation in writing as to whether or not a member of the Council is bound to obtain all information direct from the City Manager."

RULING: It is the opinion of this office that Charter Section 706 does not prohibit a Council member from seeking information by asking questions directly of department heads and other subordinates of the Chief Administrative Officer.

DISCUSSION: Charter Section 706 reads in its entirety as follows:

**INTERFERENCE IN ADMINISTRATIVE SERVICE.** Neither the Mayor nor the Council except by official action taken in policy matters, nor any of its members shall interfere with the execution by the Chief Administrative Officer of his powers and duties, or order, directly or indirectly, the appointment by the Chief Administrative Officer or by any of the department heads in the administrative service of the city, of any person to an office or employment or his removal therefrom. Except for the purpose of inquiry, the Mayor, the Council and its members shall deal with the administrative service under the Chief Administrative Officer solely through the Chief Administrative Officer and neither the Mayor nor the Council nor any member thereof shall give orders to any subordinates of the Chief Administrative Officer, either publicly or privately.

As Councilman Mandella states in his letter, the phrase in the section which is most pertinent to his request is the first part of the second sentence: "Except for the purpose of inquiry....."



Honorable Mayor and Council  
October 6, 1964  
Page 2

It will be noted that the second sentence provides (1), that the Mayor and the Councilmen "shall deal with the administrative service" which is "under the Chief Administrative Officer solely through the Chief Administrative Officer," and (2) that neither the Mayor nor any Councilman shall "give orders to any subordinates of the Chief Administrative Officer....." (Emphasis added).

The two prohibitions against dealing and giving orders apply to the administrative service which is under the Chief Administrative Officer and to all his subordinates. Other sections of the Charter make it clear that the Chief Administrative Officer has jurisdiction over all the administrative functions of the city except the offices of the City Clerk and the City Attorney, who are appointed by and serve at the pleasure of the Council and whose duties are enumerated in the Charter. Therefore, all the administrative departments, except the offices of the City Clerk and the City Attorney, "are under the Chief Administrative Officer" and all personnel therein are his "subordinates".

The prohibition against dealing directly with the departments which are under the Chief Administrative Officer is, however, made subject to the exception at the beginning of the sentence; i. e., the Mayor and the Councilmen may not deal with these departments "except for the purpose of inquiry."

Lacking any definition or further explanation of the meaning of the word "inquiry" in the Charter, the word must be given its ordinary and commonly-understood meaning. Webster's New International Dictionary, Second Unabridged Edition, defines "inquiry" as follows: "An inquiring; specif. a seeking; search for truth, information, or knowledge; examination into facts or principles; investigation; as, chemical inquiries. b A seeking for information by asking questions; interrogation; a question or questioning."

Application of the dictionary meaning to the word "inquiry" leads to the conclusion that the Charter does not prohibit members of the Council from dealing directly with the department heads and other personnel in the administrative service under the Chief Administrative Officer's jurisdiction for the purpose of seeking information by asking questions relevant to the governmental function performed by them.

Honorable Mayor and Council  
October 6, 1964  
Page 3

This right of a Council member to seek information is subject, however, to limitations contained in Section 706. First, the prohibition against giving orders to subordinates of the Chief Administrative Officer, contained in the second sentence of the section, limits the Council member's prerogative to the requesting of desired information; he has no power to give any order concerning the inquiry, for the failure to obey which the solicited employee could be disciplined for insubordination. Second, if the information requested were so frequent or extensive as to require any substantial disruption of the regular functions or duties of the department or the employee in order to furnish it (such as the preparation of an extensive, detailed report of an activity or operation), such inquiries might constitute an interference "with the execution by the Chief Administrative Officer of his powers and duties," which interference is prohibited by the first sentence of Section 706.

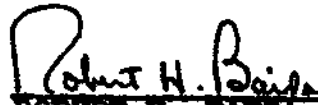
In addition, the Chief Administrative Officer, in the exercise of his responsibility "for the proper administration of all affairs of the city not otherwise assigned" in the Charter (Charter Section 705) and his authority to "[e]xercise control over all departments, offices and agencies under his jurisdiction" (Charter Section 705 (b)), may establish reasonable rules and regulations for the dissemination of information by department heads and other subordinates, and such rules and regulations would be binding upon such department heads and subordinates. For instance, he may require that information given any Councilman shall be furnished to the Administrative Office for dissemination to other members of the Council.

It should be noted, however, that the Charter appears to contemplate that such inquiries would normally be made through the Chief Administrative Officer, for, pursuant to Section 705 (1), he has the power and is required to:

- "(1) Prepare and submit to the Council reports in answer to requests for information made to him by the Council."

Honorable Mayor and Council  
October 6, 1964  
Page 4

In any discussion of the respective powers and obligations of the Council, its members, and the Chief Administrative Officer, it should be borne in mind that, in the final analysis, the Chief Administrative Officer is directly responsible to the Council for the proper administration of his duties.

  
\_\_\_\_\_  
ROBERT H. BAIDA  
City Attorney

RHB:al